

Message Text

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TO SECSTATE WASHDC IMMEDIATE 4846

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AMEMBASSY MOSCOW

AMEMBASSY LONDON

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C O N F I D E N T I A L SECTION 01 OF 02 BONN 14104

E.O. 11652: GDS

TAGS: PGOV, GW, GE, FR, UK, FR

SUBJECT: BRUECKMANN - PROPOSED LEGISLATION SOLUTION

REF: (A) BERLIN 1488; (B) BONN 13682

BEGIN SUMMARY: AT SEPTEMBER 5 BONN GROUP MEETING, UK REPS INDICATED STRONG PREFERENCE FOR FRG BILL LEGISLATING FRG CONSTITUTIONAL COURT DECISION CRITERIA, AS OPPOSED TO LEGISLATING NEW AUTHORITY FOR PUBLIC PROSECUTOR AND POSSIBILITY OF APPEAL TO FRG FEDERAL SUPREME COURT. FRG REPS AGAIN REHEARSED REASONS, PREVIOUSLY DISCUSSED AT HIGHEST FRG LEVELS, WHY FEDERAL GOVERNMENT DID NOT CONSIDER SUCH A BILL FEASIBLE OR DESIRABLE. FRG REPS ALSO GAVE CERTAIN ASSURANCES AND MADE SUGGESTIONS CONCERNING SAFEGUARDS THAT MIGHT BE TAKEN TO FACILITATE TAKEOVER IN BERLIN OF GOVERNMENT-PROPOSED LEGISLATION. END SUMMARY.

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1. AT TRIPARTITE MEETING SEPTEMBER 4, UK REPS ON IN-

STRUCTION EXPLAINED THAT LONDON STRONGLY FAVORED THE PREVIOUSLY DISCUSSED POSSIBILITY THAT THE FRG AMEND THE 1953 INNER GERMAN LEGAL ASSISTANCE LAW BY IMPOSING THE REQUIREMENTS TO SUCH ASSISTANCE ENUMERATED BY THE BUNDESVERFASSUNGSGERICHT (BVG) DECISION OF MARCH 27, 1974 IN ITS ADVISORY OPINION IN THE BRUECKMANN CASE. AS A SECOND CHOICE, ONLY IF THE FIRST SHOULD BE ABSOLUTELY UNACCEPTABLE, LONDON WAS WILLING TO EXPLORE THE POSSIBILITY OF GRANTING ADDITIONAL POWERS TO THE PROSECUTOR WITHOUT, HOWEVER, PROVIDING FOR APPEALS TO THE BUNDESGERICHTSHOF (BGH). ONLY AS A RELUCTANT FINAL FALLBACK DID LONDON ENVISAGE TAKEOVER IN THE WSB OF THE CURRENT FRG GOVERNMENT-PROPOSED DRAFT BILL, AND THEN ONLY SUBJECT TO CONDITIONS SUCH AS ALLIED REAFFIRMATION BY BK/O AND BK/L THAT DECISIONS IN CASES ARISING IN BERLIN MUST BE IN ACCORDANCE WITH ALLIED ORDERS AND DIRECTIVES, INDICATION TO FRG THAT IF BVG DECISION DOES NOT COMPLY WITH ALLIED ORDERS AND DIRECTIVES, ALLIES MIGHT BE FORCED TO DEPRIVE SUCH DECISION OF EFFECT IN WSB, AND BERLIN ASSURANCE THAT GENERALSTAATSANWALT WOULD NOT REFER TO BVG ADVISORY OPINION IN BRUECKMANN CASE.

2. AS FRENCH AND US EMBASSIES WERE WITHOUT INSTRUCTIONS AND UK INSTRUCTIONS WERE FIRM, DISCUSSION AT BONN GROUP SEPTEMBER 5 WAS CONFINED TO FIRST AND SECOND POSSIBILITIES ENVISAGED BY LONDON, NO COMMENT BEING MADE BY ALLIED REPS ON POSSIBILITY OF TAKEOVER OF FRG GOVERNMENT-PROPOSED DRAFT LAW AND CONDITIONS THEREFOR.

3. FRG JUSTICE MINISTRY REP (RENGER) STATED THAT MATTER HAD SINCE AUGUST 28 (REFTEL B) BEEN DISCUSSED BETWEEN CHANCELLERY AND JUSTICE MINISTER, AND WITH CHANCELLOR SCHMIDT. FEDERAL GOVERNMENT CONSIDERED LEGISLATIVE TAKEOVER OF BVG DECISION CRITERIA INFEASIBLE FOR THREE MAJOR REASONS: A) AS ITS EFFECT WOULD BE LIMITED TO WSB, IT WOULD BE SEEN AS DEVICE TO MAKE BVG BRUECKMANN OPINION EFFECTIVE IN WSB; USSR/GDR WOULD LIKELY SEE IT AS VIOLATION OF OR NONCOMPLIANCE WITH QA AND PART OF SYSTEMATIC EFFORT CONDONED BY ALLIES TO CIRCUMVENT WORD CONFIDENTIAL

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AND SPIRIT OF QA; B) IT WAS ALMOST CERTAIN THAT GDR WOULD REACT WITH PARTIAL OR COMPLETE CUT-OFF OF COOPERATION IN LEGAL ASSISTANCE AREA; AND C) INCLUDING LEGISLATION REQUIREMENTS CONCERNING DANGER OF SUICIDE WOULD HAVE CONSEQUENCES THROUGHOUT FRG CRIMINAL PROCEDURE, INCLUDING ON EXTRADITION AND THEREFORE ABILITY TO COMPLY WITH TREATY OBLIGATIONS, AND MAINTAINENCE OF CRIMINAL SUSPECTS IN TEMPORARY CUSTODY AND SERVING PRISON

SENTENCES. Renger stated that expectation is that first such case appealed to BVG in reliance on New Brueckmann decision suicide requirement would prompt BVG to modify and limit its far-reaching decision in this respect; legislating this requirement into law would compel courts including BVG, to apply that requirement without leaving BVG latitude to modify or limit its earlier opinion. If FRG included this requirement in legislation with

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C O N F I D E N T I A L SECTION 02 OF 02 BONN 14104

RESPECT TO RENDITION OF GERMAN NATIONALS TO GDR, UNDER EQUALITY PROVISIONS OF ARTICLE 3 OF THE BASIC LAW, THE SAME PRINCIPLE WOULD NEED TO APPLY WITH RESPECT TO EXTRADITION OF NON-GERMANS (ARTICLE 16(2) OF BASIC LAW PRECLUDES EXTRADITION OF GERMAN NATIONALS). LEGISLATION SEEKING TO LIMIT BVG SUICIDE REQUIREMENT ONLY TO GERMANS BEING CONSIDERED FOR RENDITION TO GDR UNDER 1953 LAW

WOULD BE CLEARLY DISCRIMINATORY AGAINST ALL NON-GERMANS
SUBJECT TO EXTRADITION AND THUS UNACCEPTABLE.

4. TURNING TO POSSIBLE TAKEOVER OF GOVERNMENT-PROPOSED
DRAFT BILL, RINGER STATED HE WAS NOW ABLE TO REPORT ON
THE BINDING ASSURANCE GIVEN BY KORBER TO USBER REP DURING
MEETING ON AUGUST 23 THAT BVG BRUECKMANN DECISION WOULD
NOT BE TAKEN AS THE NEW FACT BY REASON OF WHICH
GENERALSTAATSANWALT WOULD REOPEN CASE. RINGER REITERATED
THE SCENARIO REPORTED IN REFTEL B. CONCERNING THE
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THEORETICAL POSSIBILITY THAT IN A FUTURE BERLIN CASE
APPEAL MAY BE BROUGHT TO THE BGH, RINGER SAID IT FOLLOWS
FROM NORMAL FRG CRIMINAL PROCEDURE THAT TRANSMISSION OF
THE CASE FILE FROM BERLIN TO THE BGH MUST INCLUDE THE
POSITION OF THE GENERALSTAATSANWALT CONTAINING HIS VIEWS
ON THE SPECIAL LEGAL SITUATION IN THE WSB AND THE AP-
PLICABLE LAWS AND DIRECTIVES, INCLUDING THE UK COMMAND-
ANT'S CERTIFICATE IN THE BRUECKMANN CASE. THE BGH'S
RESPONSIBILITY WAS TO REVIEW THE CASE IN LIGHT OF THAT
APPLICABLE LAW IN THE WSB. RINGER SPECULATED THAT THE
ALLIES MIGHT FEEL EVEN MORE REASSURED IF THEY CONSENTED
TO TAKEOVER OF THE BILL BY BK/L STATING THEIR RESERVA-
TIONS OR UNDERSTANDING CONCERNING ITS EFFECT. RINGER
INDICATED THAT AS THE PART OF THE BILL CONFERRING UPON
THE PROSECUTOR (WHO IS SUBJECT TO EXECUTIVE ORDERS)
THE POWER TO OVERRULE FINAL AND BINDING COURT OPINIONS
WAS THE LEGALLY WEAKEST PART, LEAVING THE BILL WITHOUT
THE ADDITIONAL POSSIBILITY OF APPEAL TO THE BGH WAS
CONSIDERED INFEASIBLE.

5. THE UK REPS STATED THEIR STRONG PREFERENCE FOR THEIR
PROPOSED COURSE OF ACTION. WE UNDERSTAND, HOWEVER, THAT
BECAUSE OF STRONG FRG OBJECTIONS TO THIS COURSE OF
ACTION AND US AND FRENCH EMBASSY VIEWS THAT TAKEOVER OF
FRG DRAFT WITH CERTAIN SAFEGUARDS IS THE LEAST
OBJECTIONABLE ALTERNATIVE, UK EMBASSY IS RECOMMENDING
TO LONDON THAT THEY BE AUTHORIZED TO ACCEPT FRG PROPOSAL.
FRG REPS AGAIN STRESSED, BECAUSE OF RECONVENING OF
BUNDESTAG, URGENT NECESSITY FOR FINAL ALLIED POSITION.

6- COMMENT: WE HAVE BEEN ASSURED FRG MIN
JUSTICE REP THAT EXECUTIVE/ADMINISTRATIVE AUTHORITIES
IN BERLIN HAVE NO POWERS UNDER PRESENT LAW TO OVERTURN
KAMMERGERICHT'S DECISION IN THIS CASE. KAMMERGERICHT,
WHICH HAS TURNED DOWN NUMEROUS APPEALS ON BRUECKMANN'S
BEHALF, HAS SHOWN NO INDICATION IT PREPARED TO RECONSIDER
ITS DECISION NOW AND IF IT WERE TO DO SO WOULD BE AD-
MITTING IT WAS WRONG IN FIRST INSTANCE AND/OR THAT IT IS

AMENABLE TO POLITICAL PRESSURE (WHICH WE UNDERSTAND HAS
BEEN APPLIED BY SENAT, WITHOUT SUCCESS). WE WOULD,
HOWEVER, INVITE USBER'S ASSESSMENT, AND PARTICULARLY
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REGARDING WHAT AVENUES MIGHT BE OPEN BASED ON APPARENT
VIOLATION OF WSB LAW IN THAT BRUECKMANN HAS ALREADY BEEN
IN INVESTIGATIVE CUSTODY MORE THAN SIX MONTHS AND IT
APPEARS THERE WILL BE NO STRASBOURG DECISION BEFORE
SPRING 1975.
HILLENBRAND

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